

and 9 were amended to recite language with an antecedent basis. Thus, this rejection is overcome.

Claims 1, 4, 7 and 8 were rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,709,898 to Biggs et al. ("Biggs") for the reasons on page 2 of the office action. Applicants respectfully traverse.

Biggs is directed to a process for manufacturing a food product, wherein a food core is pre-formed, then a wafer is heated to become deformable, and then the deformable wafer is ~~shaped around the pre-formed food core. Biggs does not disclose a food product comprising~~ a sugar wafer cone that includes a filling of a substantially water-free based confectionery material that has solidified in the sugar wafer from a molten, semi-liquid, or semi-solid state prior to consumption. Instead, Biggs discloses that the food core may comprise "any desired ingredients such as ice cream, fish, meat, vegetables, fruit, nuts, chocolate pieces and the like. Preferably, the food core is ice cream" (Col. 1, lines 61-66). Most of these are items are not fat-based confectionery products, and none are introduced into the sugar wafer cone from a molten, semi-liquid, or semi-solid state that solidifies prior to consumption. Although chocolate pieces are disclosed, these are only present within another fat-based confection and the pieces are not introduced into the cone in a molten or liquid state.

Anticipation under 102 can be found only if a reference shows exactly what is claimed. *Titanium Metals Corp. v. Banner*, 778 F.2d 775 (Fed. Cir. 1985). Accordingly, as Biggs does not show exactly what is claimed, the anticipation rejection has been overcome. Therefore, Applicants request that the Examiner withdraw the rejection to claims 1, 4, 7 and 8 under 35 U.S.C. 102(a) in view of Biggs.

Claims 2 - 4, 6, 8 and 9 -12 were rejected under 35 U.S.C. 103(a) as being unpatentable over Biggs. Applicants traverse this rejection.

As mentioned above, Biggs is concerned with pre-forming a food core then wrapping or shaping a wafer around the pre-formed core, to avoid problems of filling loss through open sides of the wafer. (See Biggs, col. 20-25). The fact that Biggs teaches an *ice cream* food core shows that Biggs is not concerned a food product that will solidify so that it does not melt in hot weather, or during prolonged handling, since this is customary of ice cream products (See application, page 2, lines 17-18). Furthermore, Biggs does not disclose that the cone acts as a handle to keep a user's hands clean during eating of the confectionery product or that the product combines the pleasure and fun of eating an ice cream cone with the indulgence of a fat-based confection. Thus, Biggs does not disclose and in fact teaches away teaches away from the present invention.

More importantly, the molten filling recited in the present claims would not be suitable for the manufacturing process disclosed in Biggs. The *molten filling* of the present claims is not pre-formed, and would not be conducive to shaping a deformable wafer around it. Instead, as recited in claims 1, 10 and 11, the molten confectionery material is *filled into* the wafer, and it is allowed to solidify prior to consumption.

The dependent claims recite further differences over Biggs. Claims 3 and 13 recite that the product has a weight of between about 5 and 40 g and is bite-sized or a 2-3 bite sized piece. Also, claims 17 and 19 recite that the food product may include a topping. As Biggs does not disclose these features, these claims are further distinguishable.

In view of the above, it is believed that all claims are not anticipated or obvious over Biggs. Thus, applicants respectfully request that the Examiner withdraw all rejections based on Biggs.

Accordingly, applicants submit that the entire application is now in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree with the Applicants' position, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

No fee is believed to be due for this submission. Should any fees be due, however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,



Allan A. Fanucci Reg. No. 30256

Date: _____

12/10/01

WINSTON & STRAWN
200 Park Avenue
New York, New York, 10166

(212) 294-3311

APPENDIX A - MARKED UP VERSION

1. (Amended Once) A food product comprising a sugar wafer cone having a filling of a substantially water-free based confectionery material that has solidified in the sugar wafer from a molten, semi-liquid, or semi-solid state prior to consumption, so that the cone acts as a handle to keep a user's hands clean during eating of the product and the product combines the pleasure and fun of eating an ice cream cone with the indulgence of a fat-based confection.
3. (Amended Once) A food product according to claim 1, wherein the food product has a weight of between about 5 and 40 g and is bite-sized or a 2-3 bite sized piece.
5. (Amended Once) A food product according to claim 1, wherein the filling [is] comprises dark chocolate, milk chocolate or white chocolate, or any mixture thereof or products derived from sugar with or without milk derived components, [and] or fat and solids from vegetable or cocoa sources [in differing proportions], chocolate substitutes containing direct cocoa butter replacements, or stearines, or coconut oil, or palm oil, or butter or any mixture thereof; or nut pastes, or praline or confectioner's coatings comprising chocolate analogues with cocoa butter replaced by a non-tempering vegetable fat containing from about 60 to 90% chocolate and from about 40 to 10% of a vegetable fat.
8. (Amended Once) A food product according to claim 1, wherein edible inclusions are incorporated in the fat-based [containing] confectionery material.
9. (Amended Once) A food product according to claim 8 wherein any inclusions containing substantial amounts of water are encased within the fat-based [containing] confectionery material.
11. (Amended Once) A process according to claim 10, wherein the sugar wafer is provided in the shape of the cone and the confectionery filling is introduced to at least partially fill the cone, with the cone acting as a handle to keep a user's hands clean during eating of the product and the product combining the pleasure and fun of eating an ice cream cone with the indulgence of a fat-based confection.